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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 121120640-3457-01]

RIN 0648-XC365

Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List Iliamna Lake Seals as a Threatened or Endangered Species

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of 90-day petition finding; request for information.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to list the Pacific harbor seals in Iliamna Lake (*Phoca vitulina richardii*) as threatened or endangered under the Endangered Species Act (ESA). We find that the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Therefore, we are initiating a status review of the harbor seals in Iliamna Lake to determine if listing under the ESA is warranted. To ensure this status review is comprehensive, we solicit scientific and commercial information regarding this species.

DATES: Information and comments must be received by [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA-NMFS-2012-0236 by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0236, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Address written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.
- Fax: Address written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907-586-7557.
- Hand delivery to the Federal Building: Address written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Interested persons may obtain a copy of the petition online at the NMFS Alaska Region

website: <http://www.alaskafisheries.noaa.gov/protectedresources/seals/harbor.htm>.

FOR FURTHER INFORMATION CONTACT: Mandy Migura, NMFS Alaska Region, (907) 271-1332; Jon Kurland, NMFS Alaska Region, (907) 586-7638; or Lisa Manning, NMFS Office of Protected Resources, (301) 427-8466.

SUPPLEMENTARY INFORMATION:

ESA Statutory, Regulatory, and Policy Provisions

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 et seq.) requires that, to the maximum extent practicable, within 90 days of the receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding as to whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and promptly publish such finding in the Federal Register (16 U.S.C. 1533(b)(3)(A)).

Joint ESA-implementing regulations between NMFS and the U.S. Fish and Wildlife Service (USFWS) define “substantial information” in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. When evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (i) clearly indicates the administrative measure recommended, and gives the scientific and any common name of the species involved; (ii) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by appropriate supporting documentation in the form of bibliographic

references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

When we find that substantial information in a petition indicates the petitioned action may be warranted (a “positive 90-day finding”), we are required to promptly commence a review of the status of the species concerned (a “status review”), which includes conducting a comprehensive review of the best available scientific and commercial information. Within 12 months of receiving the petition, we must conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a more thorough review of the available information, a positive 90-day finding does not prejudice the outcome of the status review.

Court decisions clarify the appropriate scope and limitations of the Services’ review of petitions at the 90-day finding stage in making a determination as to whether a petitioned action may be warranted. As a general matter, these decisions hold that a petition need not establish a strong likelihood or a high probability that a species is either threatened or endangered to support a positive 90-day finding. Decisions under the ESA must be based on the best scientific and commercial data available. We evaluate the petitioner’s request based upon the information in the petition including its references, and the information readily available in our files. If the petitioner’s sources are based on accepted scientific principles, we will accept them and characterizations of the information presented unless we have specific information in our files that indicates the petition’s information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner’s

assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity may constitute a "species" eligible for listing under the ESA. Then, we evaluate whether the information indicates that the species faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of the threats act, will act, or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted.

Under the ESA, a listing determination may address a species, subspecies, or a distinct population segment (DPS) of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). In 1996, the USFWS and NMFS published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the ESA (DPS Policy, 61 FR 4722; February 7, 1996). This policy clarifies the agencies' interpretation of the phrase "distinct population

segment of any species of vertebrate fish or wildlife” (ESA section 3(16)) for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996).

The policy established two criteria that must be met for a population or group of populations to be considered a DPS: (1) the population segment must be discrete in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the population segment must be significant to the remainder of the species (or subspecies) to which it belongs. A population segment may be considered discrete if it satisfies either one of the following conditions: (1) it is markedly separated from other populations of the same biological taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) it is delimited by international governmental boundaries across which there is a significant difference in exploitation control, habitat management, conservation status, or if regulatory mechanisms exist that are significant in light of section 4(a)(1) of the ESA. If a population is determined to be discrete, the agency must then consider whether it is significant to the taxon to which it belongs. Considerations in evaluating the significance of a discrete population include: (1) persistence of the discrete population in an unusual or unique ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon’s range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere outside its historical geographical range; or (4) evidence that the discrete population has marked genetic differences from other populations of the species.

A species, subspecies, or DPS is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered

within the foreseeable future throughout all or a significant portion of its range (ESA section 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Section 4(a)(1) of the ESA requires the Secretary to determine whether a species is endangered or threatened due to of any of the following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species continuing existence (16 U.S.C. 1533(a)(1)). An “endangered” or “threatened” determination is not made during the 90-day review of the petition, but rather is determined subsequent to a status review.

Analysis of the Petition

On November 19, 2012, we received a petition from the Center for Biological Diversity (CBD) to list the harbor seals in Iliamna Lake, Alaska as a threatened or endangered species under the ESA and to designate critical habitat concurrent with listing. According to NMFS’s 2012 Stock Assessment Reports (<http://www.nmfs.noaa.gov/pr/pdfs/sars/>), harbor seals in Alaska are divided into 12 separate stocks, as defined by the Marine Mammal Protection Act. Harbor seals in Iliamna Lake are currently considered as part of the Bristol Bay harbor seal stock.

CBD asserts that the harbor seals found in Iliamna Lake constitute a DPS of Pacific harbor seals and refers to them in the petition as “Iliamna Lake seals.” CBD asserts that the seals in Iliamna Lake face the following threats: (1) habitat modification and disturbance associated with the Pebble Project (a copper-gold-molybdenum porphyry deposit in the advanced exploration stage located north of Iliamna Lake) and climate change; (2) disease and natural predation; (3) other natural and anthropogenic factors including risks of rarity, entanglement in

fishing gear, illegal hunting, oil and gas exploration and development, contaminants, and commercial fisheries; and (4) inadequacy of existing regulatory mechanisms for addressing greenhouse gas emissions, climate change, ocean acidification, and the Pebble Project. CBD concludes that the combination of being a small, isolated population with the identified threats qualifies the seals in Iliamna Lake for listing as a threatened or endangered species under the ESA.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information available in our files; we identified numerous factual errors, misquoted and incomplete references, and unsupported conclusions within the petition. Our review indicates that there is uncertainty and conflicting information specific to the harbor seals in Iliamna Lake. The seals inhabiting Iliamna Lake are not well studied, but there is some evidence that at least a small number of seals remain in the lake year-round. Currently, there is uncertainty and conflicting information about whether Pacific harbor seals migrate between Iliamna Lake and Bristol Bay. If there is no migration, and these seals are distinct from those in Bristol Bay, then they may face potentially serious threats including low abundance, the Pebble Project and climate change. Given this uncertainty, and considering the requirements of 50 CFR 424.14(b) and standards for addressing petitions at the 90-day stage, we find that the information presented in the petition and information readily available in our files would lead a reasonable person to believe that the petitioned action may be warranted. Therefore, we are making a positive 90-day finding and will promptly commence a status review of Iliamna Lake seals.

Request for Information

As a result of the finding, we will commence a status review of Pacific harbor seals in Iliamna Lake to determine: (1) if the Pacific harbor seals in Iliamna Lake constitute a DPS under the ESA, and if so, (2) the risk of extinction to this DPS. Based on the results of the status review, we will then determine whether listing the Pacific harbor seals of Iliamna Lake as threatened or endangered under the ESA is warranted. We intend that any final action resulting from this status review be as accurate as possible. Therefore, we are opening a 60-day public comment period to solicit comments and information from the public, government agencies, the scientific community, industry, Alaska Native tribes and organizations, and any other interested parties on the status of the Pacific harbor seals in Iliamna Lake, including:

(1) Information on taxonomy, abundance, reproductive success, age structure, distribution and population connectivity, habitat selection, food habits, population density and trends, and habitat trends;

(2) Information on the effects of potential threats, including the Pebble Project and climate change, on the distribution and abundance of seals in Iliamna Lake and their principal prey over the short- and long-term;

(3) Information on the effects of other potential threats, including disease and predation, contaminants, fishing, hunting, industrial activities, or other known or potential threats;

(4) Information on management or conservation programs for harbor seals in Iliamna Lake, including mitigation measures associated with private, tribal or governmental conservation programs which benefit harbor seals in Iliamna Lake;

(5) Information on the effects of research on the harbor seals in Iliamna Lake; and

(6) Information relevant to whether harbor seals in Iliamna Lake may qualify as a DPS.

We request that all data and information be accompanied by supporting documentation such as maps, bibliographic references, or reprints of pertinent publications. Please send any comments to the ADDRESSES listed above. We will base our findings on a review of best available scientific and commercial information available, including all information received during the public comment period.

Authority: The authority for this action is the Endangered Species act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: May 13, 2013.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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